Supreme Court, U.S.
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No. 99-____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1999

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ANDREW K. KIM,

*Petitioner,*

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, the University of Alabama School of Medicine, HAROLD J. FALLON, M.D., and KATHLEEN G. NELSON, M.D.,

*Respondents.*

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*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires procedural protections beyond an "informal give-and-take" when a student is expelled from a state school for non-academic reasons?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Andrew K. Kim respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The district court's opinion dismissing petitioner's complaint, App. B1-B18, is unpublished. The Eleventh Circuit's opinion affirming, App. A1-A5, is unpublished. The Eleventh Circuit's order denying rehearing and rehearing *en banc*, App. C1-C2, is unpublished.

## JURISDICTION

The Eleventh Circuit entered its judgment on December 29, 1998, and denied rehearing and rehearing *en banc* on May 28, 1999. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

This case presents a question involving the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law ...." U.S. Const., Amed. XIV, § 1.

## STATEMENT OF THE CASE

Petitioner Andrew K. Kim is a former medical student at respondent the University of Alabama School of Medicine ("UASOM"). Medical students at UASOM are generally required to pass Part One of the United States Medical Licensing Examination ("USMLE") before advancing to their third year of medical school. Students must pass the exam by their third try. App. B2-B3.[1]

Over a period of four years beginning in 1992, Kim was beset by a series of personal disasters that dramatically interfered with his medical studies. These included the death of his brother, Kim's resulting depression, the suicide of his sister-in-law, and harassment by a former girlfriend that ultimately required police involvement. Because of these events, Kim had sought and was granted two leaves of absence during this time period. He also requested, and was granted, the

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[1] The facts are taken from the opinions below, unless otherwise noted by citation to the record.

opportunity to repeat his second year, which he did by retaking one class and auditing several others. App. B2-B4.

By June 1996, Kim had finished repeating his second year of medical school and was scheduled to sit for part one of the USMLE that month. Because of the various upheavals and leaves of absence, Kim had missed several sittings for the USMLE after he had previously completed his second-year studies. Kim had ultimately been excused from each of those prior exams, and hence none of them counted as a failure against his three chances to pass. [R1-19, pp. 51-57, Nelson Deposition.] The June 1996 sitting was the first opportunity for Kim to take the exam after repeating his second year. App. B3-B4.

Because the harassment during his repeat second year had interfered with his studies, Kim was unprepared for the June 1996 exam and withdrew from the sitting. He notified the National Board of his withdrawal from the exam, but, due to his embarrassment, failed to notify the University. When UASOM learned that Kim had not taken the exam, Respondent Dr. Kathleen G. Nelson, Associate Dean of Students, sent Kim a letter terminating him as a medical student. App. B4.

After receiving this letter, Kim requested reinstatement or an opportunity to appeal Dr. Nelson's decision. Nelson initially denied this request and refused to allow Kim to obtain a copy of his medical school records. Kim then followed the dismissal procedures set out in the student handbook and filed a formal notice of appeal requesting a hearing before the Associate Dean for Undergraduate Medical Education. App. B4-B5.

UASOM denied Kim's request for a hearing according to the handbook. UASOM also failed to provide Kim its *de facto* appeals procedure for academic dismissals whereby a three-person panel hears a student's initial appeal. Respondent Nelson explained that the *de facto* procedure for aca-

demic dismissals was not used because Kim's expulsion was "administrative" rather than "academic." App. B5, B10-B11 (quoting Nelson deposition). Rather than use the applicable written procedures or the inapplicable academic procedures, the University had Kim meet with Nelson, and later with respondent Dr. Harold J. Fallon, Dean of the Medical School. Both Nelson and Dean Fallon denied Kim's request for reinstatement. App. B5.

Kim brought suit in the United States District Court for the Northern District of Alabama alleging, *inter alia*, a violation of his procedural due process rights based upon the lack of an adequate hearing and the failure of the University to apply its own written or *de facto* appeal procedures. Jurisdiction in the district court was based upon 28 U.S.C. § 1331, conferring federal question jurisdiction for Kim's constitutional claims as well as for several statutory claims no longer at issue on appeal.

The district court granted summary judgment for defendants, holding with respect to the procedural due process claim that Kim received sufficient process under the Fourteenth Amendment. Relying upon *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U. S. 78, 85-86 (1981), the court mistakenly held that due process in this case required only an "informal give-and-take" rather than a more formal hearing. App. B12.

The district court recognized that there is a "'significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct.'" App. B12 (quoting *Horowitz*, 435 U. S. at 86). While acknowledging that such difference requires greater procedural protections in "disciplinary" dismissals than in "academic" dismissals, the court erroneously concluded that academic dismissals therefore required even less than *Horowitz*'s "informal give-and-take" rather than that disciplinary dismissals required more than such informality. App. B12-B13 (citing *Haberle* v. *University of Alabama in Birmingham*, 803

F. 2d 1536, 1539 (CA11 1986)). The Court thereafter held that under either the *Horowitz* standard of an informal "opportunity to be heard" or some lesser standard for an academic dismissal, UASOM had provided Kim with sufficient process. App. B13. After dealing with several other claims not at issue in this petition, the district court granted defendants summary judgment on all claims.

Kim appealed to the Eleventh Circuit, seeking reversal of the district court's disposition of his procedural and substantive due process claims. Jurisdiction in the Eleventh Circuit was based upon 28 U.S.C. § 1291.

The Eleventh Circuit rejected Kim's appeal and affirmed the district court in an unpublished opinion. The court held that Kim's meetings with respondents Dr. Nelson and Dean Fallon afforded him constitutionally sufficient due process. App. A3-A4. After citing to *Haberle* and *Horowitz*, the Eleventh Circuit approved the district court's supposed acceptance of the University's explanation that its departures from University procedures "were warranted because Kim's dismissal was a hybrid case (involving aspects of both academic and disciplinary dismissal) and did not fit" the situation covered by the university's written rules or prior practices. App. A4. (In fact, the district court made no finding that the dismissal had academic aspects, and expressly noted that the dismissal was *not* on academic grounds. App. B11, B13.) The Court then concluded that "regardless of any slight variations [from UASOM procedures], Kim received the notice and informal discussion to which he was entitled." App. A4.

Kim petitioned the Eleventh Circuit for rehearing and rehearing *en banc*, both of which were denied. App. C1-C2.

This petition for a writ of certiorari followed.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Eleventh Circuit's holding that a student subject to a disciplinary dismissal

is entitled only to the informal process acceptable for academic dismissals is inconsistent with the due process standard for disciplinary dismissals in the First, Sixth, and Eighth Circuits.

The procedural standard applied by the Eleventh Circuit is also inconsistent with this Court's opinions in *Horowitz* and *Goss* v. *Lopez*, 419 U. S. 565 (1975), where this Court stated that disciplinary dismissals and dismissals accompanied by some future burden on the student require more formal procedural protections than either academic dismissals or less severe forms of discipline.

## I. The Procedural Protections Required by the Eleventh Circuit for a Disciplinary Dismissal are Inferior to, and Inconsistent with, the Protections Required by the First, Sixth, and Eighth Circuits.

As the district court recognized, Kim was not dismissed for academic reasons. Rather, he was dismissed for a supposed violation of the administrative requirement that he take the USMLE in June of 1996. Respondent Nelson effectively admitted that the dismissal was a punishment for his behavior rather than the consequence of poor academic performance when she testified that she found his failure to take the exam "totally irresponsible." [R1-19, p. 64, Nelson Dep.] Indeed, had Kim sat for and failed the exam, he would not have been dismissed, but would have been allowed to enroll in his third year and had *two more chances* to pass. [R1-19, pp. 62-63, Nelson Dep.] He was thus dismissed not for failing to *pass* the exam, but rather for failing to sit for it in June 1996.

Regardless of whether one characterizes Kim's dismissal as administrative, disciplinary, or hybrid, what it is not is "academic." [2] Kim thus is entitled to greater procedural pro-

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[2] In *Mauriello* v. *University of Medicine and Dentistry of New Jersey*, 781 F. 2d 46, 50 (CA3), *cert. denied*, 479 U. S. 818 (1986), the Third Circuit distinguished its academic case from a disciplinary dismissal, the latter

tections than in the academic dismissal at issue in *Horowitz*. The greater protections sought by Kim were an initial appeal to a neutral party – as per UASOM's rules – and the ability to know and respond to the arguments and charges raised against him by Nelson. App. B5, B10-B11. The Eleventh Circuit in this case, however, held that Kim was entitled only to the "informal give-and-take" discussed in *Horowitz* for an academic dismissal and in *Goss* for a minor disciplinary suspension of ten days or less. App. A3.

Several Circuits have recognized that non-academic dismissals require greater procedural safeguards than academic dismissals. For example, in *Woodis* v. *Westark Community College*, 160 F. 3d 435, 440 (CA8 1998), the Eight Circuit held that a college student facing disciplinary expulsion was entitled to due process "by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and *with all necessary protective measures*" (citation and quotation marks omitted; emphasis added). In finding that the expulsion in that case satisfied due process, the Eighth Circuit noted the numerous procedural protections provided the student, including an appeal to "an independent disciplinary appeals committee" and a second disciplinary hearing wherein she "had an opportunity to consult with counsel, examine evidence introduced against her and participate" in the hearing. *Id.*[3]

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defined by the district court as "'a case of her being compelled by rule, order, or law of the school to do something and not having done it getting discharged.'" Kim's case falls squarely within this disciplinary definition. He was not dismissed for failing to pass the test – an issue of academic performance – but rather for failing to sit for it – an issue of supposed violation of a rule or order.

[3] Even if this were viewed as a hybrid case, it would still be in tension with *Greenhill* v. *Bailey*, 519 F. 2d 5 (CA8 1975), wherein the Eighth Circuit recognized the general rule that academic dismissals are entitled to less procedural protections than disciplinary dismissals, but distinguished the dismissal in its case by noting the added element of disparagement of the student's intellectual ability, hindering the student's future educational

In *Hall* v. *Medical College of Ohio at Toledo*, 742 F. 2d 299, 308 (CA6 1984), *cert. denied*, 469 U. S. 1113 (1985), the Sixth Circuit reviewed both *Goss* and *Horowitz* and concluded that as far back as 1978, "some kind of *formal hearing* was apparently required before a student could be expelled for disciplinary causes" (emphasis added). Although affirming the district court's ruling on qualified immunity because the claimed right to have counsel present had not been clearly established, the Sixth Circuit observed that the student had received the "opportunity to testify on his own behalf, to present his own witnesses, and to cross-examine those witnesses presented" against him. 742 F. 2d at 309-10. He also received written copies of the various decisions against him, a transcript of the hearing was available, and he was able to raise all of his objections to the proceedings and evidence when meeting with the college president. *Id.* at 310. The Sixth Circuit concluded that "[a]side from the question of counsel, it is hard to see what further procedural safeguards could have been provided without turning this hearing process into an exact equivalent of a courtroom trial," something no court had yet done. *Id.*

The First Circuit in *Gorman* v. *University of Rhode Island*, 837 F. 2d 7, 13-14 (CA1 1988) quoted from a seminal Fifth Circuit case holding in the disciplinary context that due process "'requires something more than an informal interview with an administrative authority of the college'" (quoting *Dixon* v. *Alabama State Bd. of Educ.*, 294 F. 2d 150, 158

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opportunities. This added factor removed the case from the typical "academic" category and called for greater procedural protections. 519 F. 2d at 8-9. (The Supreme Court in *Horowitz* recounted this very aspect of *Greenhill* in explaining how the case was consistent with the academic/disciplinary dichotomy it was relying upon. 435 U. S. at 88 n. 5.) In Kim's case, even if the Court accepted the Eleventh Circuit's "hybrid" characterization, there are two added elements that tip the scales toward greater protection: the at least partial disciplinary nature of the decision, and the taint that will follow Kim through his medical school records and hinder him should he try to pursue his medical education elsewhere.

(CA5), *cert. denied*, 368 U. S. 930 (1961)). The student in *Gorman* was found to have received adequate process because he had several extensive hearings with numerous procedural protections. 837 F. 2d at 16. The procedural protections actually given to the student in *Gorman* – as well as to those in *Woodis* and *Hall* – substantially exceeded what was given to Kim, and are consistent with what Kim sought from UASOM.

On the other hand, a recent Fifth Circuit case seems to have the same view as the Eleventh Circuit in this case, holding that even in the context of disciplinary decisions, "the additional procedures required under federal law amount to nothing more than an informal hearing, that is, 'an "informal give-and-take" between the student and the administrative body dismissing him ....'" *Wheeler* v. *Miller*, 168 F. 3d 241, 248-49 (CA5 1999) (quoting *Horowitz* in turn quoting *Goss*).

This confusion among the circuits over the degree of procedural protection required for disciplinary dismissals, and over the interpretation of *Horowitz* and *Goss* in the disciplinary context, is an important issue affecting many students at public schools and universities. This Court should take this opportunity to resolve the confusion and clarify the requirements of the Due Process Clause.

## II. The Limited Procedural Protections Required by the Eleventh Circuit for a Disciplinary Dismissal Are Insufficient and in Conflict with Decisions of this Court.

In *Goss* v. *Lopez*, this Court held that a student suspended from school on disciplinary grounds for a period of ten days or less was entitled to "at least an informal give-and-take" with the relevant school authority prior to suspension. 419 U. S. at 584. The Court took special pains to "make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expul-

sions for the remainder of the school term, or permanently, may require more formal procedures." *Id.*

In *Horowitz*, this Court held that a student dismissed for "failure to meet academic standards" was entitled only to an "'informal give-and-take' between the student and the administrative body dismissing him." 435 U. S. at 79, 86 (quoting *Goss*, 419 U. S. at 584). This Court recognized that the greater severity of expulsion as compared to brief suspension weighed in favor of greater protections than in *Goss*, but it also noted that the academic basis for the dismissal weighed in the other direction, thus bringing the process due back to the level described in *Goss*. 435 U. S. at 86 n. 3, 87. The Court noted, however, that

> there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter.

*Id.* at 87.

The procedures approved by the Eleventh Circuit in this case are inadequate under the Due Process Clause and conflict with this Court's precedent in *Goss* and *Horowitz*. Kim's dismissal from medical school involves the worst elements of both *Goss* and *Horowitz* without the mitigating factors present in either case. As in *Goss*, Kim was expelled for disciplinary reasons rather than academic reasons. And as in *Horowitz*, the deprivation was severe – expulsion from school. Neither the temporary nature of the deprivation in *Goss* nor the academic nature of the decision in *Horowitz* is present in this case, and thus there is nothing to diminish the appropriate process down to the mere "informal give-and-take" of those two cases. Rather, Kim was entitled to a more formal hearing with additional safeguards to protect his interests. At a minimum, he was entitled to those safeguards the University actu-

ally provided to students dismissed for academic reasons and who were thus entitled to less process than Kim.

The decision to dismiss Kim was made in the first instance by Nelson, with the Promotions Committee simply ratifying that decision without input from Kim. He was not accorded the opportunity to appeal to the neutral Associate Dean for Undergraduate Medical Education, as provided in the Student Handbook. Rather, after considerable resistance to any process whatsoever, the University had Kim appeal to Nelson, who was already in the functional role of prosecutor. Not surprisingly, Nelson agreed with what she had recommended to the Promotions Committee. Kim's final meeting with Dean Fallon thus took place without benefit of a neutral faculty member having considered Kim's side of the story or re-evaluated Nelson's initial decision. And that final meeting with Dean Fallon was no more than an informal give-and-take – without knowledge of, or opportunity to rebut, any information provided by Nelson, App. B5 – described in *Goss* and *Horowitz* as appropriate only for short suspensions or for academic dismissals.

Given that this was a disciplinary dismissal or (in the Eleventh Circuit's inaccurate description) at best a hybrid matter, Kim was entitled to more formal procedures than he received.[4] At a minimum Kim should have received an initial appeal to a neutral decisionmaker – as provided in the student handbook – and not to a person who had already decided the matter and played the role of advocate for dismissal before the Promotions Committee. Kim also was entitled to more than just an informal give-and-take. He should have been

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[4] Indeed, it is ironic that had this actually been an academic dismissal, Kim would have received more process because the school would have applied either its *de facto* or *de jure* appeals procedures. It was only because this was not an academic dismissal that the school departed from its procedures in the first place. Unfortunately it departed in the wrong direction, providing him with less process rather than more.

able to hear and address the arguments made against him by Nelson and been allowed to question Nelson before other decisionmakers regarding her charge that Kim was irresponsible.

These greater procedures are appropriate because of the severity of the deprivation – permanent expulsion from medical school for supposedly irresponsible and improper behavior – as well as the secondary consequences of such an expulsion, including the harm to his reputation and the near impossibility of admission to another medical school with such an expulsion on his record. That severe a deprivation requires more process than a ten-day suspension or dismissal for failure to satisfy academic standards within the peculiar expertise of the educators.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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